APPENDIX A

APPENDIX A —
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, FEBRUARY 8, 2022

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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February 08, 2022

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ATLANTA, GA 30303-3309

Appeal Number: 21-12227-G
Case Style: Willie Green v. Delijah Washington
District Court Docket No: 1:20-cv-02337-MHC

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Any pending motions are now rendered moot in light of the attached order.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Lee Aaron, G
Phone #: 404-335-6172

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

Appendix A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-12227-G

WILLIE ALFRED GREEN,

Petitioner-Appellant,

versus

DELIJAH WASHINGTON,
Dept. of Community Supervision,

Respondent-Appellee,

Appeal from the United States District Court
for the Northern District of Georgia

ORDER:

To merit a certificate of appealability, a movant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 485 (2000). Because Willie Green has failed to make the requisite showing, his motion for a certificate of appealability is DENIED, and his motion to proceed on appeal *in forma pauperis* is DENIED AS MOOT.

UNITED STATES CIRCUIT JUDGE.

APPENDIX B

APPENDIX B — REPORT AND RECOMMENDATION MAGISTRATE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, DATED APRIL 13, 2021

APPENDIX B —
REPORT AND RECOMMENDATION
MAGISTRATE OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA,
DATED APRIL 13, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WILLIE ALFRED GREEN, GDC #1001517830,	:	PRISONER HABEAS CORPUS 28 U.S.C. §2254
	:	CIVIL ACTION NO.
DELIJAH WASHINGTON; et al., Defendants.	:	1:20-CV-2337-MHC-JSA

MAGISTRATE JUDGE'S ORDER AND FINAL REPORT AND RECOMMENDATION

Petitioner Willie Alfred Green, a "probationer," filed the instant *pro se* federal habeas petition pursuant to 28 U.S.C. §2254, in which he challenges his 2017 convictions and sentences in the Cherokee County Superior Court. (Docs. 1, 13).

I. Procedural And Factual History

A. Procedural History

A Cherokee County grand jury indicted Petitioner on December 12, 2016, and charged him with terroristic threats, family violence battery, aggravated stalking, burglary in the first degree, hindering an emergency telephone call, and tampering with the operation of an electronic monitoring device. (Doc. 11-7 at 4-

7).[1] On May 16, 2017, represented by Joe L. Brown, Petitioner entered a non-negotiated guilty plea to all counts except the charge of terroristic threats, and was sentenced to a net total of ten years to serve three. (*Id* at 8-12). According to Petitioner, he filed a direct appeal, but the Georgia Court of Appeals dismissed it as untimely. (Doc. 1 at 2).

Petitioner filed a state habeas corpus petition in the Monroe County Superior Court on September 25, 2017, and an amended petition on February 12, 2018, and raised the following grounds for relief:

> (1) the State violated Petitioner's due process rights by knowingly using perjured testimony to indict and prosecute Petitioner and by failing to correct what the State knew as false testimony from the victim at an ex parte hearing, when she admitted to the State that she planted evidence and staged a crime scene against Petitioner in order to have him falsely arrested;
>
> (2) the trial court violated Petitioner's Sixth Amendment rights by denying him the right to represent himself and for failing to conduct a *Faretta* hearing;[2]

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[1] All documents are referenced according to the attachment number and page numbers given by the Adobe File Reader linked to the Court's case file database ("CM/ECF").

[2] In *Faretta v. California*, 422 U.S. 806, 824 (1975), the Supreme Court recognized that a defendant may proceed *pro se* if he makes a knowing and voluntary waiver of the right to counsel. Based on *Faretta*, the Eleventh Circuit has indicated that although not required, "[t]he ideal method of assuring a voluntary waiver is for the trial judge to conduct a pre-trial hearing at which the defendant would be informed of the charges, basic trial procedures, and the hazards of self-representation." *Strozier v. Newsome*, 926 F.2d. 1100, 1104 (11th Cir. 1991).

(3) the Assistant District Attorney ("ADA") should have recused from the case since she was a material witness for the defense;

(4) trial counsel was ineffective for failing to advise Petitioner that he would not be able to withdraw his guilty plea if he entered one;

(5) the trial court violated Petitioner's Sixth and Fourteenth Amendment rights by refusing to allow defense counsel to investigate undisclosed evidence and *Brady*[3] material that was not provided to the defense by the State prior to trial and prior to Petitioner entering his guilty plea;

(6) the trial court violated Petitioner's Sixth and Fourteenth Amendment rights by refusing to allow defense counsel to investigate case law upon which the court was relying when it denied Petitioner's right to self-representation;

(7) Petitioner received ineffective assistance of counsel when counsel failed to request that the ADA be recused after learning about her off the record conversation with the victim that she staged evidence against Petitioner;

(8) the indictment is unconstitutional and void, since it is based off of false statements and testimony;

(9) the burglary charge fails as a matter of law because Petitioner was a resident at the address stated in the indictment;

(10) the aggravated stalking charge fails as a matter of law because he could not commit the crime by having contact with an alleged victim at his residence, and because it was the result of a single non-violent contact Petitioner made with the victim;

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[3] In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment[.] . . ." *Brady*, 373 U.S. at 87.

(11) Petitioner's entire case was obtained in violation of Petitioner's right to be free from unreasonable search and seizure;

(12) Petitioner's rights were violated because the indictment was void for failing to allege the essential elements of burglary; and

(13) Petitioner's guilty plea was not entered voluntarily, knowingly, and intelligently because counsel was ineffective by advising Petitioner to enter a plea when Petitioner could not legally be found guilty of several offenses with which he was charged.

(Docs. 11-1, 11-2). Following an evidentiary hearing on April 18, 2018, the state habeas court denied Petitioner relief on December 28, 2018. (Doc. 11-3). On November 18, 2019, the Georgia Supreme Court denied Petitioner's application for a certificate of probable cause to appeal the denial. (Doc. 11-5).

Petitioner filed the instant federal petition on May 23, 2020, in which he challenges his Cherokee County convictions and sentences. Petitioner raises the following issues herein:[4]

(1) the burglary indictment is fatally defective because:

(a) it failed to allege the elements of the crimes charged; and

(b) Petitioner cannot have committed a crime since he was charged with burglary of his own residence;

(2) Petitioner's guilty plea was not knowingly, voluntarily, or intelligently entered because:

---

[4] For ease of reference and discussion, the undersigned has re-enumerated and re-organized Petitioner's grounds for relief, including merging some claims that appear to be duplicative.

(a) he received ineffective assistance of counsel when:

(1) counsel misunderstood, and failed to investigate, the aggravating stalking statute and what constituted that crime, as the "place or places" clause in the statute indicates that Petitioner could not have committed an act of stalking at his own residence;

(2) counsel admittedly had a misunderstanding of the law on aggravated stalking as he was not aware that a single violation of a protective order did not amount to an offense of aggravated stalking;

(3) the trial court's bar on plea counsel's request to investigate late discovery from the State caused Petitioner to receive a constructive denial of counsel, as plea counsel admittedly was no longer prepared and ready to proceed to trial in the absence of conducting a full and complete investigation of the newly discovered evidence;

(b) the burglary count failed to allege all the elements of the crime, since Petitioner could not be convicted of a crime to which no criminality attaches by law such as burglary of one's home;

(3) Petitioner's rights were violated when the trial court denied plea counsel the right to provide effective assistance when it would not allow plea counsel to investigate undisclosed evidence and *Brady* material that was not provided to the defense by the State prior to trial and prior to Petitioner entering his guilty plea;

(4) the State knowingly used perjured testimony, false statements, and false evidence to obtain Petitioner's convictions;

(5) the indictment and convictions are unconstitutional and void because they were based on admitted false statements, false evidence, and perjured testimony, all of which the State knew before indicting Petitioner; and

(6) Petitioner is actually innocent of the charges because:

(a) his convictions and sentences are based on false evidence and perjured testimony;

(b) he received ineffective assistance of counsel when counsel failed to:

(1) make any effort to have the case dismissed because of the false evidence and perjured testimony;

(2) challenge the unconstitutionality of the State's case; and

(3) inform Petitioner that the State's knowing use of such false evidence and perjured testimony to induce his guilty plea allowed Petitioner to withdraw the plea before sentencing; and

(c) the prosecutor withheld exculpatory evidence from the defense when she did not disclose to the defense that the State was aware of the fact that the victim planted the evidence.

(Docs. 1, 35).

B. Factual History

During the plea hearing the State provided the factual basis as follows:

[T]he State's evidence would show that the victim and the Defendant were in a relationship beginning approximately around 2007. They share two children. The victim has two children from a previous relationship, but all four children were living with the victim and the Defendant in unincorporated Cherokee County in May of 2016.

There's a lengthy history of prior incidents of violence on the part of the Defendant towards the victim in this case going back to a 2009 incident in California.

And during that incident, the Defendant became physical with the victim, slapped her, pushed her down to the ground, and she reported during that incident to police other prior incidents of violence on the part of the Defendant that had taken place at the beginning of their relationship, including pointing a gun at the victim and threatening to kill her.

So in May, 2016, in this case, on the 30th, the Defendant had made threats to kill the victim a couple of days prior. He had grabbed the victim leaving bruising on her arms.

The – law enforcement came out on the 30th. They determined that the Defendant should be placed under arrest. They did so. He was taken to jail.

On the 31st of May the victim applied for and was granted an Ex Parte TPO on the basis of the threats that the Defendant had made to her and also an allegation she made about the bathroom door being busted in.

Nevertheless, the TPO was ordered – or the Ex Parte TPO Order was ordered in this case.

The Defendant bonded out of jail on the 31st. He came back to the house to do a domestic standby to get his belongings. Law enforcement met him at the residence. He came in, got his belongings.

At that time, law enforcement observed that there was a TPO there. They served the Defendant with the Ex Parte TPO. Deputy Davis read the portions to him about staying away from the residence, not having any contact with the victim, and then law enforcement left. The domestic standby was over. Defendant also left.

Later that evening, on the 31st, the Defendant started to send text messages to the victim. They were asking about, let's talk about the children. Let's get this straight. You know, let's now – so they

weren't overtly threatening, but they were certainly continuous. There were also continuous phone calls to the victim.

The victim called 911 again to report that he was violating the TPO. Law enforcement, the same officer in fact, came out and observed the text messages on the victim's phone. While the officer was out there, he observed the Defendant making calls to the victim, again while the officer was standing there and it was the telephone number that the Defendant had given the officer previously. So they were able to identify that all the – the calls over the short span of time were coming from the Defendant.

At that point, law enforcement had left and then in the early morning hours of June 1st, 2016, the victim is asleep in her bedroom with her infant son in the bed beside her or in his bed beside hers and the Defendant comes in through the window, through the air conditioning unit, into the residence that he had been excluded from.

He goes to the victim's bedroom door, kicks it in, leaves a giant hole in the bedroom door. Reaches his hand through, unlocks the bedroom door, and inside is the victim and her child.

She's already on the phone with 911 at this point, calling to report that he is back. You can hear him the audio saying: What are you doing? Give me the phone. And, eventually, he is able to get her off the phone with 911.

Of course, they call back and they're able to eventually get the victim on the line. But by that point, the Defendant has already gotten the victim into the living room, sat her down, made her put the 911 call on speakerphone so that he can hear what's going on. And, basically, gets the victim to say that it was a false alarm. It was just the TV. There nothing going on there.

But 911, looking at the call history from that location, figured something was up and so they sent out law enforcement to go check things out. And by that point, the Defendant had already fled the location.

> Law enforcement did find probable cause and so they took warrants out. The Defendant was arrested later on that day on June 1st.
>
> Subsequently, the State and previous Defense Counsel had entered into Consent Bond Agreement, allowing the Defendant to get out on bond with the condition that he be subject to a GPS ankle monitor, which was installed. . . on June 17th, 2016.
>
> From there, the Defendant eventually cut it off and fled to California. He took the victim and the four children with him. And while in California, he, basically, picked up another charge of child abduction, to which he pled guilty in October of last year.

(Doc. 11-7 at 139-43).

II. Discussion

A. Reviewable Claims

1. Standard Of Review

Under 28 U.S.C. §2254, a federal court may issue a writ of habeas corpus on behalf of a person being held in custody pursuant to a judgment of a state court if that person is held in violation of his rights under federal law. 28 U.S.C. § 2254(a); *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). This power, however, is limited. *See Mason v. Allen*, 605 F.3d 1114, 1119 (11th Cir. 2010) (stating that Section 2254 "constrains our review of legal questions decided on the merits in state court"

A federal court may not grant habeas corpus relief for claims previously adjudicated on the merits by a state court unless the state court adjudication resulted in a decision that was "contrary to, or involved an unreasonable

application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(b); *see Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010); *Johnson v. Upton*, 615 F.3d 1318, 1329 (11th Cir. 2010). "This is a 'difficult to meet,'... and 'highly deferential standard for evaluating state-court rulings, which demands that state court decisions be given the benefit of the doubt[.]'" *Cullen*, 563 U.S. at 181 (citations omitted); *see also Renico v. Lett*, 559 U.S. 766, 773 (2010).

In applying 28 U.S.C. §2254(d), a federal habeas court must first determine the applicable "clearly established Federal law," based on "the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 404-05, 412 (2000). Next, the Court must ascertain whether the state court decision is "contrary to" that clearly established federal law by determining if it "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or "confronts a set of facts that are materially indistinguishable" from relevant Supreme Court precedent and arrives at an opposite result. *Id.* at 405-06; *see also Windom v. Secretary, Dep't of Corr.*, 578 F.3d 1227, 1247 (11th Cir. 2009).

If the Court determines that the state court decision is not contrary to clearly established federal law, the Court must decide whether the state court decision was

an "unreasonable application" of clearly established federal law by concluding whether the state court identified the correct governing legal principle from the Supreme Court's decisions, but unreasonably applied that principle to the facts of the petitioner's case. *Williams*, 529 U.S. at 412; *Windom*, 578 F.3d at 1247. This reasonableness determination is objective, and the Court may not issue a federal writ of habeas corpus simply because it concludes in its independent judgment that the state court was erroneous or incorrect. *Williams*, 529 U.S. at 411; *see also Woodford v. Visciotti*, 537 U.S. 19, 24 (2002); *Valle v. Sec'y for Dep't of Corr.*, 478 F.3d 1326, 1327 (11th Cir. 2007) (en banc). In other words, it does not matter that the state court's application of clearly established federal law was incorrect, so long as that misapplication was objectively reasonable. *See Harrington v. Richter*, 562 U.S. 86, 101 (2011) ("For purposes of §2254(d)(1), an unreasonable application of federal law is different from an incorrect application of federal law.") (internal quotation marks and citations omitted); *accord*, *Woodford*, 537 U.S. at 26; *Williams*, 529 U.S. at 411; *McIntyre v. Williams*, 216 F.3d 1254, 1257 n.4 (11th Cir. 2000). Likewise, "a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding[.]" *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

When performing its review under §2254(d), the Court must presume that the state court's determination of factual issues is correct unless the petitioner presents clear and convincing evidence that the state court determinations were erroneous. 28 U.S.C. §2254(e)(1); *Windom*, 578 F.3d at 1247. "[W]hen the relevant state-court decision . . . does not come accompanied with reasons[,] . . . the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale [and] . . . presume that the unexplained decision adopted the same reasoning." *Wilson v. Sellers*, __ U.S. __, 138 S. Ct. 1188, 1192 (2018).

Finally, 28 U.S.C. §2254(e)(2) provides that no evidentiary hearing is permitted unless Petitioner can demonstrate that:

> (A) the claim relies on –
>
> > (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable; or
> >
> > (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have been found guilty of the underlying defense.

Petitioner has not made such a showing. As a result, his motion for a hearing [Doc. 40] is **DENIED**.

2. The State Habeas Court's Decisions As To Grounds 1(b), 2(a)(1), 2(a)(2), and 6(b)(3) Are Entitled To Deference.[5]

In Ground 1(b), Petitioner argues that the indictment is defective since Petitioner was charged with burglary of his own residence, which is not a crime. Petitioner claims in Grounds 2(a)(1) and 2(a)(2) that his guilty plea was involuntary based on counsel's ineffective assistance because counsel misunderstood what constituted a crime under the aggravated stalking statute – in that Petitioner could not have committed an act of stalking at his own residence or based on a single violation of a protective order. In Ground 6(b)(3), Petitioner states that he is actually innocent of the charges against him based on counsel's ineffective assistance when counsel failed to inform Petitioner that the State's knowing use of false evidence and perjured testimony to induce his guilty plea allowed Petitioner to withdraw the plea before sentencing.

a. Knowing And Voluntary Plea

First, to the degree that Petitioner generally claims that his guilty plea was not made knowingly, intentionally or voluntarily, the state habeas court made the following relevant findings of fact:

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[5] Respondent argues that the Court also should defer to the habeas court's "implicit" decision denying Ground 1(a). Specifically, Respondent claims that although the state habeas court did not explicitly reject Ground 1(a), this Court should infer that the habeas court did so because it denied the entire petition. (Doc. 22-1 at 6). This Court does not have to presume that the state habeas court rejected Petitioner's claim in 1(a), however, because, as will be discussed further in Section II.B.1., Petitioner waived any such claim when he entered his guilty plea.

> After plea counsel and the State had conducted a portion of voir dire, Petitioner's mother approached plea counsel and asked him to talk to Petitioner because Petitioner did not want to go to trial. When plea counsel spoke to Petitioner, Petitioner expressed his concern that the jury "hate[d]" him, and asked plea counsel to try and revive the State's prior plea offer of 10 years with 90 to 120 days to serve. Plea counsel spoke with the prosecutor, but by that time the State's previous offer had long expired, and the State was not amenable to reviving it because it had already expended funds to fly the victim from California and had received a prior conviction for Petitioner for a crime committed in California.
>
> * * *
>
> Once it came time for Petitioner to enter the guilty plea, the only way the prosecutor would agree to allow Petitioner [to] enter it was for him to plead guilty to the burglary charge. While plea counsel did not believe Petitioner should have been considered to have committed burglary, at that point, the judge had ruled against him. Because the trial court had denied his motions to dismiss and quash the indictment, Petitioner's options were to either got [sic] to trial or enter the guilty plea. Plea counsel believed it would be in Petitioner's best interest to enter a guilty plea, and Petitioner agreed. The victim being produced had a "great impact" on Petitioner's decision to enter the guilty plea because, with the victim present, "the State now could prove their case beyond a reasonable doubt." Petitioner did not want to go to trial and it "was clear" to plea counsel that Petitioner "absolutely wanted to enter a [guilty] plea."
>
> Petitioner was informed of the rights he would be waiving by entering the guilty plea, including the right against self-incrimination, the right to confrontation, and the right to a jury trial. Ultimately, it was Petitioner's decision to enter the guilty plea, and counsel believed Petitioner did so knowingly, intelligently, and voluntarily.

(Doc. 11-3 at 6-7, 8). These factual findings are presumed to be correct because Petitioner has not demonstrated with clear and convincing evidence that they are erroneous. *See* 28 U.S.C. §2254(e).

"A reviewing federal court may set aside a state court guilty plea only for failure to satisfy due process: 'If a defendant understands the charges against him, understands the consequences of a guilty plea, and voluntarily chooses to plead guilty, without being coerced to do so, the guilty plea . . . will be upheld on federal review.'" *Stano v. Dugger*, 921 F.2d 1125, 1141 (11th Cir. 1991) (citations omitted). "Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

During the plea colloquy, Plaintiff stated under oath that counsel answered any questions he had about the plea form, and that he understood: the charges against him; that by entering a plea he was giving up the right to a jury trial and to be free from compulsory self-incrimination; the maximum sentence for all of the charges for which he was entering a plea; that entering a plea could affect his probation or parole in another of his criminal cases; and that he was not pleading guilty because of any undue promise or pressure but was doing so voluntarily. (Doc. 11-7 at 143-47). To the extent that Petitioner now contends that he did not knowingly, intelligently, or voluntarily enter into the plea, his allegations are belied by his sworn statements during the plea colloquy. In short, the record clearly shows that Petitioner understood the charges against him and the consequences of his guilty plea, and that he chose voluntarily to enter a plea without coercion or duress. *See* Doc. 10 at 10 (state habeas court's final order)

(finding Petitioner entered a guilty plea after he was fully apprised of the rights he would be waiving if he did so, and the fact "[t]hat Petitioner now regrets his choice to enter the guilty plea after accepting plea counsel's advice that entering the guilty plea was in Petitioner's best interest does not . . . support a finding that Petitioner's guilty plea was not knowing, intelligent, and voluntary.").

b. The Burglary Indictment Was Sufficient.

The state habeas court reviewed Ground 1(b) that the burglary indictment was defective because Petitioner could not have committed burglary of his own home, and found:

> Under Georgia law, if a criminal defendant can admit all the allegations in the indictment and still not be guilty of a crime, then the indictment has failed to sufficiently allege that the defendant committed a crime and the resulting plea is void. *Wright v. Hall*, 281 Ga. 318, 319(1), 638 S.E.2d 270 (2006).
>
> Here, Petitioner was charged with burglary in that he "*without authority*" and with the intent to commit a felony therein, enter [sic] the dwelling house of another, to wit: Shardae Allen . . ." (HTX. 004) (emphasis added). As discussed in section A above, Petitioner was excluded from the residence pursuant to a temporary protective order, and therefore had no authority to enter the residence. *See Slaughter v. State*, 327 Ga. App. 593, 596(b), 760 S.E.2d 609 (2014). The indictment is not void, and this ground lacks merit.

(Doc. 11-3 at 11).[6] Petitioner has not demonstrated that the state's habeas court's decision was unreasonable.

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[6] Unlike Ground 1(b), Petitioner did not waive this claim by entering a guilty plea, because a claim that an indictment fails to charge an offense is jurisdictional

O.C.G.A. §16-7-1(b) provides in relevant part that "[a] person commits the offense of burglary in the first degree when, without authority and with the intent to commit a felony or theft therein, he or she enters or remains within an occupied . . . dwelling house of another[.] . . ." As discussed further herein in Section II.A.2.(c)(2), *infra*, the temporary protective order in this case specified that Petitioner vacate and stay away from the home and its inhabitants – *i.e.,* the victim and her children. (Doc. 11-3 at 5-6; Doc. 11-7 at 83-85).

Under Georgia law, "[o]nce a victim has 'withdrawn the defendant's authority to enter [the victim's] house,' the fact that a defendant may have previously lived there . . . 'does not, in itself, give the defendant subsequent authority to enter.'" *Slaughter v. State*, 760 S.E.2d 609, 612 (Ga. Ct. App. 2014) (citations omitted). And the Georgia Court of Appeals has explicitly rejected a claim similar to Petitioner's under Georgia law. *See id.* at 612 ("Because the temporary protective order specifically deprived Slaughter of any authority to enter the victim's home, and because the evidence thus supported a conclusion that Slaughter entered that home without authority and with the intent to commit the crime of aggravated stalking, . . . the evidence was sufficient to sustain Slaughter's conviction for burglary."). *See also Polanco v. State*, 797 S.E.2d 204, 205-06 (Ga.

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in nature and squarely falls within the exception to the Supreme Court's rule that a guilty plea waives non-jurisdictional claims challenging pre-plea events. *United States v. Broce*, 488 U.S. 563, 569 (1989); *Tollett v. Henderson*, 411 U.S. 258, 266 (1973); *United States v. Peter*, 310 F.3d 709, 713 (11th Cir. 2002).

Ct. App. 2017) (holding evidence was sufficient to sustain a burglary conviction where, although the defendant used to live in the residence with his wife and family, a protective order was put in place that required him to stay away from the family residence, he subsequently entered the home through a bedroom window, and there was evidence of past domestic violence to support a finding that when he entered the apartment he had intent to commit a felony against the victim); *Bray v. State*, 669 S.E.2d 509, 510-11 (Ga. Ct. App. 2008) (holding evidence was sufficient to sustain convictions for aggravated stalking and burglary where defendant, in violation of a bond condition, entered his ex-wife's home uninvited and threatened her and her boyfriend).

This Court must defer to the Georgia courts to interpret their own law. *See Tatara v. Sec'y, Dep't of Corr.*, __ F. App'x __, 2021 WL 1017300, at *1, 4 (11th Cir. Mar. 17, 2021) (stating that it "must defer to the rulings of the state courts" on state law issues because "[i]t is a 'fundamental principle that state courts are the final arbiters of state law, and federal habeas courts should not second-guess them on such matters.'") (quoting *Callahan v. Campbell*, 427 F.3d 897, 932 (11th Cir. 2005)). Put another way, "'[a] state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved.'" *Will v. Sec'y for Dep't of Corr.*, 278 F. App'x 902, 908 (11th Cir. 2008) (citations omitted). *See also Hunt v. Tucker*, 93 F.3d

735, 737 (11th Cir. 1996) (stating that federal courts entertaining petitions for writs of habeas corpus must follow the state court's interpretation of state law absent a constitutional violation). Consequently, Petitioner is not entitled to relief in connection with Ground 1(b).

c. Counsel Was Not Ineffective

1. *Ineffective Assistance Of Counsel Standard*

The standard for evaluating ineffective assistance of counsel claims was set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Green v. Nelson*, 595 F.3d 1245, 1239 (11th Cir. 2010). "An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland*, 466 U.S. at 687). To establish deficiency, a petitioner is required to establish that "counsel's representation 'fell below an objective standard of reasonableness[.] . . .'" *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 688). To establish prejudice, a petitioner must prove a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Allen v. Sec'y, Fla. Dep't of Corr.*, 611 F.3d 740, 750 (11th Cir. 2010). The court may "dispose of [the] ineffectiveness claim[] on either of its two grounds." *Atkins v. Singletary*, 965 F. 2d 952, 959 (11th Cir. 1992); *see Strickland*, 466 U.S. at 697

("[T]here is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one.").

Strickland's two-pronged test applies to counsel's representation of a defendant in connection with a guilty plea. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985). To demonstrate counsel's ineffective assistance after entering a plea, the petitioner must show that his "counsel's constitutionally ineffective performance affected the outcome of the plea process[,]" *id.* at 59, by "convinc[ing] the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010). *See also Jackson v. United States*, 463 F. App'x 833, 835 (11th Cir 2012) ("If Jackson cannot establish both that counsel misadvised him and that a decision not to plead guilty would have been rational, his claim that his guilty plea was not knowing and voluntary due to counsel's ineffectiveness will fail."). "[A] petitioner's bare allegation that he would not have pleaded guilty is insufficient to establish prejudice under *Strickland*. *Roach v. Roberts*, 373 F. App'x 983, 985 (11th Cir. 2010) (per curiam) (citation omitted).

2. *Counsel Was Not Ineffective Regarding the Aggravated Stalking Charge*

To the degree that Petitioner argues in Grounds 2(a)(1) and 2(a)(2) that his plea was involuntary based on counsel's ineffectiveness for misunderstanding, and failing to investigate, the aggravated stalking statute, his arguments are without merit. Specifically, Petitioner finds fault with counsel's performance since, according to Petitioner, he could not have committed an act of stalking at his own residence; nor can a single violation of a protective order amount to aggravated stalking.

In connection with Petitioner's argument that he could not have committed aggravated stalking based on a single violation of the protective order, the state habeas court found that counsel did, in fact, file a demurrer to the indictment which raised substantially the same argument, and denied the motion after a hearing. (Doc. 11-3 at 10). Consequently, the state habeas court applied *Strickland* and determined that Petitioner had not demonstrated that counsel's performance was deficient or that he was prejudiced thereby. (*Id.* at 10-11). Petitioner has not shown that this decision was unreasonable.

Indeed, among the first motions counsel filed was a motion to dismiss, and a motion to quash, the indictment, arguing, *inter alia*, that the State had failed to allege a pattern of conduct to support the aggravated stalking charge. (Doc. 11-8 at 239, 242, 278). Because counsel did, in fact, raise this issue, he cannot be

ineffective for failing to do so. And since the trial court denied those motions, Petitioner has not demonstrated that he was prejudiced by any such failure. Petitioner, therefore, has failed to show that the state habeas court's decision was contrary to, or an unreasonable application of, *Strickland*, or based on an unreasonable application of the facts.

Although the state habeas court did not explicitly rule on Petitioner's claim that he could not have committed aggravated stalking at his own residence, the state habeas court did make a finding of fact that during the hearing on the motions the trial court admitted a temporary protective order, apparently as part of the Clerk's record, that ordered Petitioner to vacate the family residence, turn over all means of access to the residence to the Cherokee County Sheriff, and to stay away from the victim, the residence, and their minor children. (Doc. 11-3 at 5-6; Doc. 11-7 at 83-85). Even if the state habeas court did not discuss this particular issue in its overall denial of the petition, it appears that the court did, in fact, consider that issue and rejected it. Regardless, Petitioner's claim fails.

In order to prove aggravated stalking under Georgia law, the State is required to show: (1) a protective order prohibited the petitioner from engaging in certain conduct with respect to the protected person; (2) the petitioner, *inter alia*, contacted the protected person without her consent; (3) that such act violated the protective order; and (4) that such act was done for the purpose of harassing and

intimidating the protected person. *See* O.C.G.A. §15-5-91(a); *Nosratifard v. State*, 740 S.E.2d 290, 294 (Ga. Ct. App. 2013). Contrary to Petitioner's argument, the statute contains no exception for the fact that Petitioner may have resided at the home prior to the protective order being entered.

To that end, the temporary protective order in this case specifically awarded the victim sole and exclusive use of the "family residence," ordered Petitioner to immediately leave the residence and surrender his keys and all other security devices to the Cherokee County Sheriff's Office, and instructed him to stay away from the residence. (Doc. 11-7 at 83-85). Consequently, the protective order made it clear that the residence no longer was Petitioner's, and that a violation of that order – *i.e.*, contacting the victim without her consent – constituted aggravated stalking. *See Newsome v.* State, 657 S.E.2d 540, 542-43 (Ga. Ct. App. 2008) (holding convictions for aggravated stalking supported by wife's testimony that a protective order was in place which removed the defendant from their home and two weeks later he drove up to the house, ran up the driveway, and shot her and their child). *Cf. Crane v. State*, 678 S.E.2d 542, 543-44 (Ga. Ct. App. 2009) (finding that regardless of whether the victim previously consented to the defendant's presence on her property to visit the children, any such prior consent did not alter the fact that on those occasions for which he was prosecuted the victim did not so consent).

Because this claim has no merit, counsel could not have been deficient for failing to raise it; nor can Petitioner show that he was prejudiced thereby. *See Lockhart v. Fretwell*, 506 U.S. 364, 482 (1993) ("[I]neffective-assistance claims predicated on failure to make wholly frivolous or unethical arguments will generally be dispensed with under *Strickland*'s first prong[.]"); *Howard v. Warden,* No. 18-14571-B, 2019 WL 1931866, at *1 (11th Cir. Mar. 29, 2019) ("Howard's post-plea counsel was not ineffective for failing to raise meritless claims."); *Harrison v. United States*, 577 F. App'x 911, 915 (11th Cir. 2014) ("In short, the failure of Harrison's appellate counsel to raise these meritless issues on appeal cannot have constituted ineffective assistance."); *Ladd v. Jones*, 864 F.2d 108, 110 (11th Cir. 1989) ("[S]ince these claims were meritless, it was clearly not ineffective for counsel not to pursue them."). Accordingly, Petitioner is not entitled to relief in connection with Grounds 2(a)(1) and 2(a)(2).

3. *Petitioner's Actual Innocence Claim Fails*

In Ground 6(b)(3), Petitioner argues that he is actually innocent based on counsel's ineffective assistance in failing to inform Petitioner that the State's knowing use of false evidence and perjured testimony to induce his guilty plea allowed Petitioner to withdraw the plea before sentencing.[7] While Petitioner raised

[7] Respondent treats this claim as one for ineffective assistance of counsel; however, Petitioner argues in this ground for relief that he is actually innocent based on that ineffective assistance. *See* Doc. 1 at 13.

this issue of ineffective assistance of counsel in his state habeas proceedings, he did not raise the additional claim that he was actually innocent based on that ineffective assistance.

Pretermitting whether this actual innocence claim is procedurally defaulted, any such claim constitutes a claim of legal innocence instead of factual innocence that Petitioner would be required to show. *See, e.g., Martin v. Stewart*, No. 20-10529-H, 2020 WL 4590632, at *2 (11th Cir. May 15, 2020) (indicating that a petitioner claiming he is actually innocent must show factual, rather than legal, innocence); *accord McQuiggin v. Perkins*, 569 U.S. 383, 396 n.1, 399 (2013). To make that factual showing, a petitioner must provide "new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." *Schlup v. Deno*, 865 (1995); *see also Kuenzel v. Comm'r, Ala. Dep't of Corr.*, 690 F.3d 1311, 1315-16 (11th Cir. 2012).

Here, Petitioner does not provide any new reliable evidence to support an actual innocence claim, but instead he claims that he received ineffective assistance of counsel. This argument of legal innocence is insufficient to satisfy Petitioner's burden of demonstrating that he is, in fact actually innocent. *See Woulard v. Sec'y, Dep't of Corr.*, 707 F. App'x 631, 635 (11th Cir. 2017) (stating that the petitioner's claim that his attorney was ineffective for failing to file a

motion to suppress "if true, may lend support for legal innocence, but [he] has not met the high bar of providing new evidence that supports *factual* innocence") (emphasis in original).

Because Respondent has not addressed the overall actual innocence claim as procedurally defaulted and instead asks the Court to provide deference to the state habeas court's decision on the underlying ineffective assistance claim, the undersigned will review that ineffective assistance claim. In connection therewith, the state habeas court found, in relevant part, that:

> Prior to Petitioner entering the guilty plea, plea counsel explained to Petitioner that the plea was non-negotiated and what it meant for a plea to be non-negotiated, including explaining to Petitioner that he would not be able to withdraw his guilty plea once he entered it. Plea counsel believed Petitioner understood all of this.

(Doc. 11-3 at 7). Petitioner has not provided any evidence, let alone clear and convincing evidence, to overcome the presumption that these facts are correct. And based on these facts, the state habeas court applied *Strickland* and found that:

> [P]lea counsel explained to Petitioner that he would be entering a non-negotiated plea, explained to Petitioner what that meant, and that because the guilty plea was non-negotiated, Petitioner would be unable to withdraw the guilty plea once he entered it. Petitioner has failed to demonstrate that plea counsel performed deficiently in his advice regarding the nature of the plea.

(*Id.* at 10). Petitioner has not demonstrated that the state habeas court's conclusion was contrary to, or an unreasonable application of, *Strickland*, or based on an

unreasonable application of the facts. Consequently, Petitioner is not entitled to relief in connection with Ground 6(b)(3).

B. Non-Reviewable Claims

1. Petitioner Waived Grounds 1(a), 3, 4, 5, And 6(a) By Pleading Guilty.

In Ground 1(a), Petitioner claims that the burglary charge in his indictment was fatally defective because it failed to allege the essential elements of the crime charged. Petitioner contends in Ground 3, as amended, that the trial court violated his rights when it did not allow counsel to investigate *Brady* material that the State did not provide to the defense prior to trial. In Grounds 4 and 5, Petitioner argues that the State knowingly used perjured testimony, false statements, and false evidence to obtain his convictions, and the indictment and convictions are unconstitutional because they were based thereon. Finally, Petitioner argues in Ground 6(a) that he is actually innocent because his convictions were based on false evidence and perjured testimony.[8]

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[8] Notably, Petitioner raised in the state habeas proceedings claims similar to the underlying claim in Ground 6(a) that his convictions were based on false evidence and perjured testimony, as he claimed that the State knowingly used perjured testimony to indict and prosecute him and failed to correct what the State knew was false testimony in violation of his Fifth and Fourteenth Amendment rights. (Doc. 11-3 at 12). Petitioner also raised a claim that his Fourth Amendment rights were violated because the victim staged the evidence that resulted in his arrest. (*See id.*). The state habeas court found that Petitioner waived these similar claims when entering his guilty plea. (*Id.* at 13-14).

As discussed previously herein in connection in Footnote 6, *supra*, after entering into a guilty plea a defendant may not raise any non-jurisdictional claims relating to the deprivation of rights that occurred before the entry of the plea. *Tollett*, 411 U.S. at 266. *See also United States v. Ward*, 796 F. App'x 591, 599 (11th Cir. 2019) ("To the extent Ward challenges the indictment as defective, he waived that challenge by pleading guilty. Although '[a]n indictment must set forth the essential elements of the offense,' . . . a guilty plea waives all non-jurisdictional defects that occurred before the entry of the plea, including an omission of a mens rea element from an indictment[.] . . .") (quoting *United States v. Martinez*, 800 F.3d 1293, 1295 (11th Cir. 2015)); *Monsegue v. United States*, No. 17-3054-C, 2018 WL 6979305, at *4 (11th Cir. Jul. 17, 2018) (denying certificate of appealability as to, *inter alia*, petitioner's pre-plea claims because "reasonable jurists would not debate the district court's finding that Monsegue waived his challenges to the government's evidence, warrants, and indictments" when he

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While Petitioner claims that he is actually innocent of the convictions, the underlying claim is the same – that is, that his convictions are based on false testimony and evidence provided by the victim to secure his arrest – and thus are also waived by his guilty plea. Moreover, Petitioner was aware of this alleged evidence at least two months before entering his guilty plea, the evidence was presented during the hearing on his motions to dismiss and quash the indictment, and the trial court found that any such issue would go to the victim's credibility and thus was a jury question. (Doc. 11-8 at 239-45; Doc. 11-7 at 24, 47, 52, 55-56). As a result, Petitioner has not provided any "new reliable evidence" that would demonstrate his factual innocence.

entered a voluntary and knowing guilty plea), *cert. denied*, __ U.S. __, 139 S. Ct. 1360 (Mar. 18, 2019).

A challenge that the indictment is defective because it does not allege one or more of the essential elements of the charge is, in fact, non-jurisdictional. *See United States v. Cotton*, 535 U.S. 625, 630-31 (2002) (holding that indictment omissions are non-jurisdictional); *United States v. Abreu*, __ F. App'x __, 2020 WL 7774951, at *3 (11th Cir. Dec. 30, 2020) (stating that so long as an indictment charges a defendant with violating a statute, "the omission of an essential element of the offense, while rendering the indictment insufficient, does not implicate the district court's jurisdiction" and thus by entering a guilty plea defendant waived his challenge that the indictment was incoherent and incomprehensible); *Ward*, 796 F. App'x at 599 (indicating that a post-plea claim that the indictment did not set forth all of the essential elements is non-jurisdictional and waived by the guilty plea); *United States v. Brown*, 752 F.3d 1344, 1451 (11th Cir. 2014) (stating that "review of the relevant precedent shows that an omission of an element from an indictment does not deprive the district court of jurisdiction"). Because Grounds 1(a), 3, 4, 5, and 6 essentially are non-jurisdictional challenges to the indictment, Petitioner waived those claims when he voluntarily entered into a guilty plea.

2. Procedurally Defaulted Claims

a. Rules Regarding Procedural Default

Federal habeas review is generally barred for a claim that was procedurally defaulted in state court. As the Eleventh Circuit has explained,

> [p]ursuant to the doctrine of procedural default, a state prisoner seeking federal habeas corpus relief, who fails to raise his federal constitution[al] claim in state court, or who attempts to raise it in a manner not permitted by state procedural rules is barred from pursuing the same claim in federal court . . . .

Iderman v. Zant, 22 F.3d 1541, 1549 (11th Cir. 1994) (citations omitted). Thus, a claim not previously raised in state court is procedurally defaulted when it is clear that a state court would find that it is "barred by [state] law" from considering the merits of the claim. *Castille v. Peoples*, 489 U.S. 346, 351 (1989).

A federal habeas petitioner can overcome a procedural bar if he demonstrates either (1) cause for the default and actual prejudice, or (2) a fundamental miscarriage of justice, *i.e.*, that unless the federal court reviews the defaulted claim, the petitioner will remain incarcerated despite his actual innocence. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Murray v. Carrier*, 477 U.S. 478, 488-89, 495-96 (1986); *Owen v. Secretary for Dep't of Corr.*, 568 F.3d 894, 908 (11th Cir. 2009). To establish cause, the petitioner must show that some objective factor external to the defense impeded his or counsel's efforts to comply with the state's procedural rule. *Murray*, 477 U.S. at 488. "To establish

'prejudice,' a petitioner must show that there is at least a reasonable probability that the result would have been different" had he presented his defaulted claim. *Spencer v. Sec'y, Dep't of Corr.*, 609 F.3d 1170, 1180 (11th Cir. 2010) (quotation marks and citations omitted).

To establish a fundamental miscarriage of justice, *i.e.*, "that constitutional error has caused the conviction of an innocent person," a petitioner must present "new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial[,]" which demonstrates that "it is more likely than not that no reasonable juror would have convicted him" if the underlying offenses. *Schlup v. Delo*, 513 U.S. 298, 324 (1995); *Scarlett v. Sec'y, Dep't of Corr.*, 404 F. App'x 394, 400 (11th Cir. 2010). The actual innocence exception is "exceedingly narrow in scope," and the petitioner must demonstrate that he is factually innocent rather than legally innocent. *San Martin v. McNeil*, 633 F.3d 1257, 1267-68 (11th Cir. 2011) (quoting *Bousely v. United States*, 523 U.S. 614, 623 (1998)).

b. Grounds 2(a)(3), 2(b) 6(b)(1), 6(b)(2), And 6(c) Are Procedurally Defaulted.

Petitioner alleges in Ground 2(a)(3) that he is actually innocent because the trial court constructively denied counsel to Petitioner when it would not allow plea counsel a continuance based on the late discovery and when counsel admittedly no longer was prepared for trial. In Ground 2(b), Petitioner argues that he is actually

innocent because the burglary count failed to allege all the elements of the crime, since he could not burglarize his own home. In grounds 6(b)(1) and 6(b)(2), Petitioner raises claims that he is actually innocent of the charges because of counsel's ineffective assistance in failing to: (1) make any effort to have the case dismissed because of the victim's false evidence and perjured testimony; and (2) challenge the unconstitutionality of the State's case, respectively. Petitioner did not raise any of these specific actual innocence claims before the state habeas court, and he has not demonstrated cause or prejudice to excuse the procedural default of these claims.

Insofar as Petitioner argues that he is actually innocent, just as with Ground 1(b) discussed in Section I.B.2(c)(3), *supra*, all of these arguments rest on legal innocence, and Petitioner has not provided any new reliable evidence which would demonstrate that it is more than likely than not that no reasonable juror would have voted to find him guilty of the underlying charges. *See Martin*, 2020 WL 4590632, at *1; *McQuiggin* 569 U.S. at 396 n.1, 399; *Schlup*, 513 U.S. at 324. *See also Woulard*, 707 F. App'x at 635. As a result, Petitioner has failed to overcome the procedural default of these claims and, accordingly, the Court cannot review them.

IV. Conclusion

For the foregoing reasons,

IT IS RECOMMENDED that the instant §2254 habeas petition [Docs. 1, 13] be **DENIED** and that this action be **DISMISSED**.

IT IS ORDERED that Petitioner's motion for final disposition [Doc. 22] and Petitioner's renewed motion to appoint counsel [Doc. 41] be **DENIED AS MOOT**.

V. Certificate Of Appealability ("COA")

According to Rule 11 of the Rules Governing Section 2254 Proceedings for the United States District Courts, a district court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Under 28 U.S.C. §2253(c)(2), a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." A prisoner satisfies this standard by demonstrating that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong and that any dispositive procedural ruling by the district court is debatable. *Miller-El v. Cockrell*, 537 U.S. 322, 366 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Petitioner has failed to make a substantial showing that reasonable jurists would find "debatable or wrong" the undersigned's conclusions that Petitioner's grounds for relief are without merit or are procedurally barred.

Accordingly, **IT IS FURTHER RECOMMENDED** that a COA be **DENIED.**

The Clerk is **DIRECTED** to terminate the referral to the undersigned Magistrate Judge.

IT IS SO RECOMMENDED AND ORDERED this 13th day of April, 2021.

JUSTIN S. ANAND
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, DATED MAY 27, 2021

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APPENDIX C —
ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA,
DATED MAY 27 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WILLIE ALFRED GREEN, **Petitioner,** **v.** **DELIJAH WASHINGTON,** **Respondent.**	**PRISONER HABEAS CORPUS** **28 U.S.C. § 2254** **CIVIL ACTION FILE** **NO. 1:20-CV-2337-MHC**

ORDER

Presently before the Court is Magistrate Judge Justin S. Anand's Final Report and Recommendation ("R&R") [Doc. 44], in which he recommends that the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be denied. The Order for Service of the R&R [Doc. 45] provided notice that, in accordance with 28 U.S.C. § 636(b)(1), the parties were authorized to file objections within fourteen (14) days of the receipt of that Order. Petitioner has filed two identical copies of his objections to the R&R [Docs. 50, 54] ("Pet'r's Objs.").

In reviewing a Magistrate Judge's R&R, the district court "shall make a de novo determination of those portions of the report or specified proposed findings

or recommendations to which objection is made." 28 U.S.C. § 636(b)(l). "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by the district court." United States v. Schultz, 565 F.3d 1353, 1361 (11th Cir. 2009) (internal quotation marks omitted) (quoting Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir. 1988)). Absent objection, the district court judge "may accept, reject, or modify, in whole or in part, the findings and recommendations made by the magistrate judge," 28 U.S.C. § 636(b)(l), and need only satisfy itself that there is no plain error on the face of the record in order to accept the recommendation. See United States v. Slay, 714 F.2d 1093,1095 (11th Cir. 1983). In accordance with 28 U.S.C. § 636(b)(l) and Rule 72 of the Federal Rules of Civil Procedure, the Court has conducted a de novo review of those portions of the R&R to which objections have been made and has reviewed the remainder of the R&R for plain error. See Slay, 714 F.2d at 1095.

Petitioner, who appears to be on probation or community supervision in Temple Terrace, Florida, filed the instant 28 U.S.C. § 2254 petition for a writ of habeas corpus (the "Petition") [Doc. 1] on May 29, 2020, to challenge his 2017 convictions in Cherokee County Superior Court for family violence battery, aggravated stalking, first degree burglary, hindering an emergency telephone call,

and tampering with the operation of an electronic monitoring device. Pet. at 1; General Bill of Indictment [Doc. 11-7 at 4-7]; Final Disposition [Doc. 11-7 at 10-14]. Petitioner has raised six grounds for relief, some of which include various sub-claims. Pet. at 11-14.

In the R&R, the Magistrate Judge determined that, with respect to Grounds 1(b), 2(a)(1), 2(a)(2), and 6(b)(3), this Court must, pursuant to 28 U.S.C. § 2254(d), defer to the state habeas corpus court's determination that Petitioner is not entitled to relief because Petitioner has failed to demonstrate that the state court's findings and conclusions were unreasonable. R&R at 13-27. The Magistrate Judge further concluded that Petitioner waived Grounds 1(a), 3, 4, 5, and 6(a) by pleading guilty and that the remainder of Petitioner's claims, Grounds 2(a)(3), 2(b) 6(b)(1), 6(b)(2), and 6(c), are procedurally defaulted. R&R at 27-32.

In order to discuss Petitioner's Objections, some factual background is necessary. During Petitioner's guilty plea, the prosecution recited the factual basis of Petitioner's crimes,[1] which is summarized as follows: Petitioner and his

[1] Document 11-7 is one of several attachments to Defendants' Answer-Response [Doc. 9] to the Petition. Document 11-7 is "Volume 2" of the transcripts and exhibits from Petitioner's state court proceedings. There are several transcripts in Document 11-7, including two transcripts from trial proceedings occurring on May 15, 2017 [Doc. 11-7 at 21-69], and May 16, 2017 [Doc. 11-7 at 93-191]. On May 15, 2017, the state court conducted some pre-trial matters, and jury selection began on May 16, 2017. Petitioner initiated his guilty plea in the middle of jury selection

girlfriend, Shardae Allen, lived together with four children in Cherokee County. Tr. (May 16, 2017) at 97. Petitioner had previously engaged in violence against Ms. Allen. Id. On May 30, 2016, Petitioner was arrested by Cherokee County Police for violence and threats against Ms. Allen. Id. at 97-98. On May 31, 2016, Ms. Allen was granted an *ex parte* temporary protective order ("TPO") which required Petitioner to stay away from the shared residence and not have contact with Ms. Allen. Id. at 98. The TPO was served on Petitioner. Id. Nonetheless, on the evening of May 31, 2016, Petitioner sent Ms. Allen numerous text messages and attempted to call her. Id. at 98-99. Ms. Allen called 911 and reported that Petitioner was in violation of the TPO. Id. at 99. In the early morning hours of June 1, 2016, Defendant broke into Ms. Allen's residence and kicked down her bedroom door. Id. Ms. Allen called 911, but Petitioner made Ms. Allen tell 911 operators that it was a false alarm. Id. at 99-100. The police responded anyway, but by the time police arrived, Petitioner had fled. Id. at 100. The police were able to arrest Petitioner later that day on June 1, but after he had been released on bond, Petitioner cut off his ankle monitor and fled to California, taking Ms. Allen and the

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on May 16, 2017, and the Court conducted the full the change-of-plea hearing on that day. These transcripts will be referred to as "Tr. (May 15, 2017)" and "Tr. (May 16, 2017)" for ease of reference.

children with him. Id. Petitioner was arrested in California on other charges, pled guilty, and eventually returned to Georgia. Id. at 100-01.

In his objections, Petitioner first contends that it is undisputed that the TPO obtained by Ms. Allen was based on perjured testimony and, as a result, his convictions were improper. Pet'r's Objs. at 1-3. According to Petitioner, Ms. Allen staged the crime scene and lied to police to make him look guilty and lied to the state court to obtain the TPO. Id. It appears that Ms. Allen did, in fact, stage the evidence on May 30, 2016, to make it appear that Petitioner had kicked a door down on that date, even though Petitioner had kicked it down on an earlier date. Tr. (May 16, 2017) at 135. Ms. Allen also testified to other significant events in which Petitioner physically abused her, id. at 132-34, and the trial court was well aware of these facts when it accepted Petitioner's guilty plea.

To the degree that Petitioner seeks to establish his actual innocence claim as a gateway to review his procedurally defaulted claims,[2] the Magistrate Judge

[2] A freestanding claim of actual innocence is not a cognizable claim for § 2254 relief. Collins v. Sec'y. Dept. of Corr., 809 F. App'x 694, 696 (11th Cir. 2020) (citing Cunningham v. Dist. Att'y's Office for Escambia Cnty., 592 F.3d 1237, 1272 (11th Cir. 2010), and Jordan v. Sec'y. Dept. of Corr., 485 F.3d 1351, 1356 (11th Cir. 2007)). Rather, a viable claim of actual innocence acts as a gateway through which petitioners may obtain review of procedurally defaulted claims, Rozzelle v. Sec'y Dept. of Corr., 672 F.3d 1000, 1011 (11th Cir. 2012), or claims barred by the statute of limitations, McQuiggin v. Perkins, 569 U.S. 383 (2013).

pointed out that Petitioner had failed to present any new evidence in support of his claim. R&R at 25. In order to establish a claim of actual innocence to demonstrate a miscarriage of justice, Petitioner must present *new* evidence that was not available at the time of his conviction, McQuiggin, 569 U.S. at 399, but Ms. Allen had recanted her allegation that Petitioner had assaulted and stalked her prior to Petitioner's guilty plea. R&R at 27-28 n.8; Tr. (May 15, 2017) at 9. Because Petitioner pleaded guilty after learning about the recantation, he has waived all claims related to it.

Although Petitioner has now filed the affidavit[3] of Ms. Allen, stating that she agreed to testify against Petitioner and that prosecutors told her she would not be prosecuted for perjury for doing so, Petitioner did not present this affidavit to the Magistrate Judge. As Petitioner presents this new evidence for the first time in connection with his objections, this Court declines to consider it. See Williams v. McNeil, 557 F.3d 1287 (11th Cir. 2009) ("[A] district court has discretion to decline to consider a party's argument when that argument was not first presented

[3] After the Magistrate Judge issued the R&R, Petitioner filed two identical copies of an affidavit by Ms. Allen in which she states that a prosecutor promised her "that in exchange for my cooperation and testimony with [the prosecutor's] case that I would not be prosecuted for giving perjured testimony at the TPO hearing on May 31st 2016 and that I would also not be prosecuted for planting evidence against Mr. Green at our home on May 30th 2016." [Docs. 51, 53 at 3].

to the magistrate judge."); see also United States v. Howell, 231 F.3d 615, 621 (9th Cir. 2000) (holding that district courts are not required to consider supplemental factual allegations presented for the first time in objections to a magistrate judge's report and recommendation).

Even if this Court were to consider the affidavit evidence, it is not new evidence tending to show it is more likely than not that no reasonable jury would have convicted him. Schlup v. Delo, 513 U.S. 298, 327 (1995). As stated above, the trial court was well aware that Ms. Allen admitted to staging the crime scene to make Petitioner appear guilty. As noted by the prosecution at Petitioner's plea hearing, Petitioner was not charged with (or convicted of) crimes related to the staged crime. Tr. (May 16, 2017) at 136. Moreover, as noted by the trial court, Petitioner was served with a TPO, and he violated that order by entering the house and kicking down Ms. Allen's bedroom door. Id. at 141. While Petitioner raises a valid argument that he should not have been convicted for violating a protective order when the protective order was granted based on perjured testimony, the trial court's determination that Petitioner's conviction could stand because the protective order was facially valid is not "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); United States v. DuBose, 598

F.3d 726, 733 (11th Cir. 2010) (holding that in a 28 U.S.C. § 922(g)(8) prosecution—possession of a firearm while subject to domestic protective order—the validity of an underlying protective order is irrelevant to defendant's conviction); Roland v. Phillips, 19 F.3d 552, 556 (11th Cir. 1994) (holding that, in the context of a 42 U.S.C. § 1983 action, a sheriff's deputy "correctly charged" the plaintiff with obstruction for violating a "facially valid, judicial restraining order").

Petitioner further argues that the Magistrate Judge erred in concluding that, by pleading guilty, he had waived his challenges to his burglary conviction. Pet'r's Objs. at 4-11. According to Petitioner, his indictment for burglary did not sufficiently recite the elements necessary to sustain his conviction, and he could not be convicted for burglary by entering his own home. Id. at 6. Petitioner points to Georgia case law for the proposition that a guilty plea does not act as a waiver of a claim of a fatally flawed indictment. See, e.g., Smith v. Hardrick, 266 Ga. 54, 55 (1995). However, by its terms, § 2254 is limited to federal challenges to a conviction or sentence, and under federal law, defects in an indictment are not "jurisdictional." United States v. Cotton, 535 U.S. 625, 630 (2002). "Once a plea of guilty has been entered, non-jurisdictional challenges to the conviction's constitutionality are waived, and only a challenge to the voluntary and knowing nature of the plea can be raised." McCoy v. Wainwright, 804 F.2d 1196, 1198

(11th Cir. 1986) (citing McMann v. Richardson, 397 U.S. 759 (1970)); see also Merilien v. Warden, 17-13117-H, 2019 WL 3079386, at *2 (11th Cir. May 3, 2019) (holding that a claim that the indictment was invalid is waived by subsequent guilty plea); United States v. Vargas, 563 F. App'x 684, 686 (11th Cir. 2014) (holding that a claim that the indictment was insufficient is waived by virtue of guilty plea).

Next, Petitioner contends that the Magistrate Judge erred in concluding that one of his ineffective assistance claims, Ground 3, was waived by his guilty plea. Pet'r's Objs. at 11-16. However, despite the way he words the claim, Ground 3 does not raise a claim of ineffective assistance. Rather, that ground asserts that Petitioner's rights were violated when "the trial court denied plea counsel the right to provide effective assistance when it would not allow plea counsel to investigate undisclosed evidence and Brady material that was not provided to the defense . . . ." Am. Pet. [Doc. 13-1] at 1. It is thus clear that Ground 3 raises a claim under Brady v. Maryland, 373 U.S. 83 (1963)—which was waived by Petitioner's guilty plea—and not a claim of ineffective assistance of counsel.

Finally, in response to Petitioner's extensive argument that he was denied his right to represent himself under Faretta v. California, 422 U.S. 806 (1975), this Court agrees with the trial court that Petitioner made his request to proceed pro se

too late. Tr. (May 16, 2017) at 59 (denying motion to proceed pro se because Petitioner waited "until after the case was called for trial to make that request"); see also, United States v. Young, 287 F.3d 1352, 1354 (11th Cir. 2002) (holding that request to proceed pro se is untimely if made after "meaningful trial proceedings commenced").

Accordingly, it is hereby **ORDERED** that Petitioner's Objections [Docs. 50, 54] to the R&R are **OVERRULED**. The Court **APPROVES AND ADOPTS** the Final Report and Recommendation [Doc. 44] as the opinion and order of this Court. It is hereby **ORDERED** that the petition for a writ of habeas corpus [Doc. 1] is **DENIED**.

It is further **ORDERED** that a Certificate of Appealability is **DENIED** because Petitioner has not met the requisite standard. See Slack v. McDaniel, 529 U.S. 473, 483-84 (2000) (citing 28 U.S.C. § 2253(c)). Petitioner may seek a certificate from the Eleventh Circuit Court of Appeals under Federal Rule of Appellate Procedure 22. Rule 11(a), Rules Governing § 2254 Cases in United States District Courts.

The Clerk is **DIRECTED** to close this case.

IT IS SO ORDERED this 27th day of May, 2021.

Mark H. Cohen

MARK H. COHEN
United States District Judge

APPENDIX D

APPENDIX D —
ORDER OF STATE HABEAS COURT
DATED DECEMBER 20, 2018

APPENDIX D —
ORDER OF STATE HABEAS COURT
DATED DECEMBER 20, 2018

IN THE SUPERIOR COURT OF MONROE COUNTY
STATE OF GEORGIA

WILLIE ALFRED GREEN, GDC # 1001517830, Petitioner, v. JAMES PAYNE, Warden, Respondent.	* * * * * * * * * *	CIVIL ACTION NO. 2017-CV-428 HABEAS CORPUS

FINAL ORDER

Petitioner filed this habeas corpus petition challenging the validity of his May 2017 Cherokee County convictions, arising from a guilty plea, for one count each of first degree burglary, aggravated stalking, tampering with the operation of an electronic monitoring device, family violence battery, and hindering an emergency telephone call, for which he received a concurrent. Upon consideration of the record as established at the April 18, 2018 hearing in this case,[1] the Court DENIES relief based upon the following findings of fact and conclusions of law.

[1] Citations to the transcript of the April 18, 2018 hearing are designated "HT." followed by the page number(s), and citations to the volume containing the exhibits from the evidentiary hearing are "HTX." followed by the page number(s).

I. PROCEDURAL HISTORY

On December 14, 2016, Petitioner was indicted by a Cherokee County grand jury for terroristic threats (count 1), family violence battery (count 2), aggravated stalking (count 3), first degree burglary (count 4), hindering an emergency telephone call (count 5), and tampering with the operation of an electronic monitoring device (count 6). (HTX. 002-005).

On May 16, 2017, Petitioner pleaded guilty to first degree burglary (count 4), for which he received a 10-year "split" sentence, 3 to serve and the balance on probation; aggravated stalking (count 3), for which he received a concurrent 10-year "split" sentence, 3 to serve and the balance on probation; tampering with the operation of an electronic monitoring device (count 6), for which he received a concurrent 5-year "split" sentence, 3 to serve, and the balance on probation; family violence battery (count 2), for which he received a concurrent 12-month sentence; and hindering an emergency telephone call (count 5), for which he received a concurrent 12-month sentence . (HTX. 008). The count of terroristic threats (count 1) was nolle prossed. (HTX. 008).

Petitioner filed this petition on September 25, 2017, challenging these convictions and raising 10 grounds, including claims that he received ineffective assistance of guilty plea counsel. In February 2018, Petitioner

filed an amendment to add three grounds, one of which claiming he received ineffective assistance of guilty plea counsel.

On April 18, 2018, this Court held an evidentiary hearing at which Petitioner and Petitioner's former guilty plea counsel testified. At the close of the hearing, the Court left the record open and gave Petitioner 30 days from the date the transcript was filed to supplement it if he believed anything was missing. (HT. 62). The transcript was filed on May 2, 2018. Petitioner did not submit any additional evidence, and the record was closed on or about June 4, 2018.

More than two months later, on August 9, 2018, Petitioner filed a motion to amend and supplement his habeas corpus petition. Petitioner later filed another motion to amend his petition November 1, 2018. However, Petitioner lost his "unfettered right" to amend his petition after the evidentiary hearing in his case began. *See Nelson v. Zant*, 261 Ga. 358, 359, 405 S.E.2d 250 (1991). Though the Court gave him 30 days after the transcript was filed to supplement it, Petitioner filed nothing within that period. Though O.C.G.A. § 9-11-14(b) provides that the pleadings will conform to the evidence absent objection, nothing in the Civil Practice Act permits a party to amend his pleadings after the trial has been had and the evidence closed. The Court denies Petitioner's post-hearing motions to amend his petition.

II. THE GROUNDS FOR RELIEF

A. INEFFECTIVE ASSISTANCE OF COUNSEL (Grounds 4, 7, and 13)

In ground 4, Petitioner alleges he received ineffective assistance of guilty plea counsel, claiming plea counsel failed to advise Petitioner that he would not be able to withdraw his guilty plea once he entered it.

In ground 7, Petitioner alleges he received ineffective assistance of plea counsel, claiming counsel failed to request that the prosecutor recuse herself after an alleged conversation she had with the victim that the victim "staged evidence against the petitioner to have him falsely arrested and that she committed perjury at an ex parte hearing[.]".

In ground 13, Petitioner alleges his guilty plea was not knowingly, voluntarily, and intelligently entered based on ineffective assistance of counsel, alleging plea counsel "incompetently advised him" to plead guilty to the burglary and aggravated stalking charges because he was a lawful resident of the premises.

Findings of Fact

Petitioner was represented on the charges and at the plea proceeding by Joe Louis Brown (hereinafter "plea counsel"). (HT. 10). Plea counsel was admitted to practice law in Georgia in 1992, and by the time he was retained

to represent Petitioner, he had handled hundreds of felony cases, including approximately 30 felony trials. (HT. 8-9).

Prior to plea counsel being retained to represent Petitioner, Petitioner was represented by two other attorneys. (HT. 9-10). By the time plea counsel came to represent Petitioner, Petitioner's case was on a trial calendar. (HT. 9). Plea counsel requested and received a continuance to give him time to receive the discovery from Petitioner's case and had just filed his discovery motions. (HT. 9).

Plea counsel spoke with Petitioner "a lot," particularly about the motions he filed. (HT. 11). Among the motions plea counsel filed was a motion to dismiss the indictment and a motion to quash the indictment, wherein plea counsel argued that the State had failed to allege a pattern of conduct to support the aggravated stalking charge (count 3), and because Petitioner lived at the residence the State alleged he had burglarized that the burglary charge failed as a matter of law. (HT. 10-11; HTX. 024-026, 028, 045, 049-050, 462-68).

During a hearing on plea counsel's motions prior to trial, the trial court heard argument from both plea counsel and the State, during which the trial court admitted the temporary protective order ordering Petitioner to vacate the family residence, turn over all means of access (keys, garage door openers) to the Cherokee County Sheriff, and to stay away from the victim,

the residence, and their minor children. (HT. 10-11, 081-086). At the close of evidence and argument on the motions to dismiss and quash, the trial court denied the motions. (HT. 053-054).

Plea counsel discussed all the charges with Petitioner and that it was unlikely the victim was going to come to court because she had relocated to California, and according to Petitioner and Petitioner's mother, she had no interest in coming to the trial. (HT. 11). Ultimately, however, the State successfully subpoenaed the victim and flew her from California to Georgia for the trial. (HT. 12; HTX. 060). Prior to the State securing the victim's attendance, Petitioner's position was that they were going to go to trial, and when the victim was not presented by the State, plea counsel would move to dismiss for want of prosecution. (HT. 12). Once it became clear the victim was going to be present at trial, plea counsel believed "things started to unravel a bit." (HT. 12).

After plea counsel and the State had conducted a portion of voir dire, Petitioner's mother approached plea counsel and asked him to talk to Petitioner because Petitioner did not want to go to trial. (HT. 13; HTX. 103). When plea counsel spoke to Petitioner, Petitioner expressed his concern that the jury "hate[d]" him, and asked plea counsel to try and revive the State's prior plea offer of 10 years with 90 to 120 days to serve. (HT. 13; HTX. 134-35). Plea counsel spoke with the prosecutor, but by that time the State's

previous offer had long expired, and the State was not amenable to reviving it because it had already expended funds to fly the victim from California and had received a prior conviction for Petitioner for a crime committed in California. (HT. 13; HTX. 130, 134-35, 140-41, 170-71).

Prior to Petitioner entering the guilty plea, plea counsel explained to Petitioner that the plea was non-negotiated and what it meant for a plea to be non-negotiated, including explaining to Petitioner that he would not be able to withdraw his guilty plea once he entered it. (HT. 14). Plea counsel believed Petitioner understood all of this. (HT. 14).

Petitioner suggested to plea counsel several times that the prosecutor was biased against him or had something against him personally. (HT. 15). The thrust of Petitioner's contention at the time was that the State had impermissibly communicated with the victim, and "it was [Petitioner's] position that the prosecutor should not be allowed to communicate with its own witness." (HT. 38). Plea counsel saw no evidence of impropriety and in his professional opinion believed a motion to recuse the prosecutor would have been frivolous. (HT. 15, 38).

Once it came time for Petitioner to enter the guilty plea, the only way the prosecutor would agree to allow Petitioner enter it was for him to plead guilty to the burglary charge. (HT. 15). While plea counsel did not believe Petitioner should have been considered to have committed burglary, at that

point, the judge had ruled against him. (HT. 15). Because the trial court had denied his motions to dismiss and quash the indictment, Petitioner's options were to either got to trial or enter the guilty plea. (HT. 33). Plea counsel believed that it would be in Petitioner's best interest to enter a guilty plea, and Petitioner agreed. (HT. 48). The victim being produced had a "great impact" on Petitioner's decision to enter the guilty plea because, with the victim present, "the State now could prove their case beyond a reasonable doubt." (HT. 49). Petitioner did not want to go to trial and it "was clear" to plea counsel that Petitioner "absolutely wanted to enter a [guilty] plea." (HT. 14, 32, 49).

Petitioner was informed of the rights he would be waiving by entering the guilty plea, including the right against self-incrimination, the right to confrontation, and the right to a jury trial. (HT. 15-16; HTX. 016, 143). Ultimately, it was Petitioner's decision to enter the guilty plea, and plea counsel believed Petitioner did so knowingly, intelligently, and voluntarily. (HT. 50).

Conclusions of Law

A petitioner seeking to establish ineffective assistance of counsel has the burden to prove that his counsel provided constitutionally ineffective assistance under the standard set forth in *Strickland v. Washington*, 466 U.S.

668 (1984). The *Strickland* standard applies in the guilty plea context. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

The first prong of attorney performance is the same standard of competence previously announced in *Tollett v. Henderson*, 411 U.S. 258 (1973), and *McMann v. Richardson*, 397 U.S. 759 (1970), which is that counsel's advice must be within the range of competence demanded of attorneys in criminal cases. *Hill v. Lockhart*, 474 U.S. at 56, 58. The actual prejudice prong in the plea context requires a showing that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59; *see also Zant v. Means*, 271 Ga. 711, 712, 522 S.E.2d 449 (1999); *Thompson v. Greene*, 265 Ga. 782, 785, 462 S.E.2d 747 (1995). Petitioner has the burden to establish both prongs of ineffective assistance of counsel to prevail on his claim. *Strickland*, 466 U.S. at 687.

Turning first to ground 4, plea counsel explained to Petitioner that he would be entering a non-negotiated plea, explained to Petitioner what that meant, and that because the guilty plea was non-negotiated, Petitioner would be unable to withdraw the guilty plea once he entered it. Petitioner has failed to demonstrate that plea counsel performed deficiently in his advice regarding the nature of the plea.

As for ground 7, because a motion to recuse the prosecutor for speaking to and learning information from her own witness would have been meritless, plea counsel did not perform deficiently when he declined to file such a motion. *See Lupoe v. State*, 284 Ga. 576, 580 (3)(f), 669 S.E.2d 133 (2008) (failure to file a meritless motion cannot constitute deficient performance).

Turning to ground 13, plea counsel filed a demurrer to the indictment and made substantially the same argument asserted by Petitioner here, and after a hearing on plea counsel's motion, the trial court denied it. Plea counsel correctly informed Petitioner that he then had two options: enter a guilty plea or proceed to trial, and Petitioner chose to enter a guilty plea after being fully apprised of the rights he would be waiving by doing so. That Petitioner now regrets his choice to enter the guilty plea after accepting plea counsel's advice that entering the guilty plea was in Petitioner's best interest does not mean that plea counsel performed deficiently, nor does it support a finding that Petitioner's guilty plea was not knowing, intelligent, and voluntary. *See King v. State*, 215 Ga. 139, 141 (2), 449 S.E.2d 870 (1994).

Petitioner has also failed to establish the requisite prejudice. He has not shown that, but for the alleged errors of counsel, he would not have pleaded guilty but would have gone to trial. While in the midst of picking a jury for Petitioner's trial, Petitioner told plea counsel that he was concerned

about the jury's perception of him and that he did not want to proceed to trial.

The claims of ineffective assistance of counsel lack merit.

B. VOID INDICTMENT
(Ground 12)

In ground 12, Petitioner alleges that the indictment is void because it charges no crime, claiming that the burglary charge fails because it alleged he was burglarizing his own home.

Findings of Fact and Conclusions of Law

Under Georgia law, if a criminal defendant can admit all the allegations contained in the indictment and still not be guilty of a crime, then the indictment has failed to sufficiently allege that the defendant committed a crime and the resulting plea is void. *Wright v. Hall*, 281 Ga. 318, 319 (1), 638 S.E.2d 270 (2006).

Here, Petitioner was charged with burglary in that he "*without authority* and with the intent to commit a felony therein, enter the dwelling house of another, to wit: Shardae Allen..." (HTX. 004) (emphasis added). As discussed in section A above, Petitioner was excluded from the residence pursuant to a temporary protective order, and therefore had no authority to enter the residence. *See Slaughter v. State*, 327 Ga. App. 593, 596 (b), 760 S.E.2d 609 (2014). The indictment is not void, and this ground lacks merit.

C. THE REMAINING GROUNDS
(Grounds 1, 2, 3, 5, 6, 8, 9, 10, and 12)

In ground 1, Petitioner alleges violations of his Fifth and Fourteenth Amendment rights, claiming the State "knowingly used perjured testimony to indict and prosecute the Petitioner and by failing to correct what the State knew was false testimony[.]"

In ground 2, Petitioner alleges violations of his Sixth Amendment rights, claiming the trial court denied him the right to represent himself by failing to conduct a *Faretta*[2] hearing.

In ground 3, Petitioner alleges that the assistant district attorney who prosecuted his case "should have been recused" because "she was a material witness for the defense."

In ground 5, Petitioner alleges violations of his Sixth and Fourteenth Amendment rights, claiming the "trial court denied the Petitioner's counsel the right to provide effective assistance of counsel when the court would not allow the defense counsel to investigate undisclosed Brady material that was not provided to the defense by the state[.]"

In ground 6, Petitioner alleges violations of his Sixth and Fourteenth Amendment rights, claiming the "trial court denied the Petitioner's counsel the right to provide effective assistance of counsel by refusing to allow the

[2] *Faretta v. California*, 422 U.S. 806 (1974).

defense counsel to investigate a case law that the court was relying on as the reason why the court was denying the Petitioner the right to self-representation."

In ground 8, Petitioner alleges the "bill of indictment is unconstitutional and void," claiming that it "is based off of false statements and testimony known to the State to have been false[.]"

In ground 9, Petitioner alleges the "burglary charge against [him] fails legally," claiming he "was a resident of the address stated in the indictment."

In ground 10, Petitioner alleges "aggravated stalking against the Petitioner fails legally," claiming "the aggravated stalking charge was the result of a single non-violent contact the Petitioner made with" the victim.

In ground 11, Petitioner alleges violations of his Fourth Amendment rights, claiming the victim staged the evidence that resulted in his arrest.

Findings of Fact and Conclusions of Law

These claims were waived by the entry of Petitioner's guilty plea. A guilty plea waives all known and unknown defenses and comprehends all the factual and legal elements necessary to sustain a final judgment. *United States v. Broce*, 488 U.S. 563 (1989); *Tollett v. Henderson*, 411 U.S. 258 (1973); *Clark v. Caldwell*, 229 Ga. 612, 193 S.E.2d 816 (1972). In addition,

> a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of

APPENDIX E

Exhibits From Trial Court Record

questions?

THE COURT: Do you have any questions?

MR. BROWN: Just the few.

THE COURT: Go ahead.

CROSS-EXAMINATION

BY MR. BROWN:

Q. So, Ms. Allen, the perjured testimony that you're referring to, what were the allegations of perjury specifically?

A. Because he kicked in the door, not on the day of the 30th, he kicked it in previously.

Q. Okay. So the date that's in the Indictment is not the date that he kicked in the door. Is that your testimony?

A. Yes, he didn't kick it in on the 30th.

Q. Okay. So the evidence that the police saw on the floor is evidence that you staged?

A. For the 30th?

Q. Yes.

A. Yes.

MR. BROWN: I have no further questions, Your Honor.

THE COURT: (No response.)

MR. BROWN: I have no further questions, Your Honor.

THE COURT: You can step down. Thank you.

(Whereupon, the witness exits the front of the courtroom.)

THE COURT: All right. Do you have any evidence or

argument on the issue of sentencing?

MR. BROWN: I think I made my arguments prior to the -- my client entering guilty.

THE COURT: Right. Okay. Anything else from the State?

MS. MURPHY: Yes, Your Honor, the State would want to point out to the Court, I'm sure the Court can see it, but the Defendant in the Indictment is not charged with anything to do with a broken-down bathroom door that they keep -- keep making such a big issue about, the victim having staged the evidence.

It's not charged. It's something that happened throughout the events of this case, but it's not charged. It's not a material element. So relying on it being perjured testimony or anything like that, it's not -- it shouldn't have any bearing on the outcome of this case.

This is a case of domestic violence where abusers often use tactics of control to control their victims, to make their victims do things that they want their victims to do.

I think this case is an excellent example of how the Defendant has used control tactics over and over again to get the victim to do exactly what he wants her to do starting with the case in 2009, that was never followed through with because they moved out of Georgia.

PETITIONER'S EXHIBIT #3

DEFENDANT'S EXHIBIT 2

Willie and I had a verbal argument where he said he was going to put me on child support for my daughter and not allow me to see her. Willie was going to the store to buy an A/C unit so I knew as soon as he left I was going to call the police and make something up to get him arrested so he wouldn't be able to keep her from me. As soon as he left, I went to the living room on top of the fireplace mantel to get a gold lock that was previously broken from the bathroom door a month or so prior. I threw it on the floor in the bathroom near the door to make it look like it was freshly broken. I called the police hoping to sound frantic and said my spouse hit me. The police came to the house I told them Willie slapped me on my left side of my face, which he didn't. I told them when we were arguing I went to the bathroom and locked myself in and Willie kicked the door in and pushed me causing me to fall on my knees, which he didn't. I lied and showed them the broken lock so hopefully since I had no visible injuries they would believe the story I was making up by showing them the broken lock. There were no injuries because I was never hit and the door wasn't kicked in, it was only a verbal argument. I was upset and I did not want to be away from my daughter so I told lies and staged the bathroom up to make it look like an altercation occurred when it didn't. This occured May 30, 2016.

Because the Temporary Protective Order specifically deprived the Defendant of any authority to enter the victim's home and because the evidence thus supported a conclusion that the Defendant entered that home without authority and with the intent to commit the crime of aggravated stalking, the evidence was sufficient to sustain the Defendant's conviction for burglary.

And then the case of *Littleton versus the State*, 225 Ga. App. 900, a 1997 case, basically stood for the same proposition. That the Temporary Protective Order basically excluded the Defendant, who was a previous resident of the location, by nature of having the Protective Order issued and having the stay-away provision in that Order, the Defendant is no longer able to come to that residence. And the way in which a Defendant comes back to a residence is also determinative of whether he can be convicted of a burglary count.

And so the evidence at trial would support all of these contentions if we're able to get there. So that's part of it. But all these allegations that the victim has perjured herself and admitted to lying, I think once the Court takes a look at it, you will see that the written statement that the Defense is relying on, along with the recorded phone calls between the victim and the Defendant's mother in this case, they certainly talk

around the issues of being truthful, but on the specific points of terroristic threats and burglary and those things, it's not direct on those issues and certainly a witness's credibility is something for the jury to consider when all the evidence is before it and there's the opportunity for cross-examination and all of these things that are reserved for a trial.

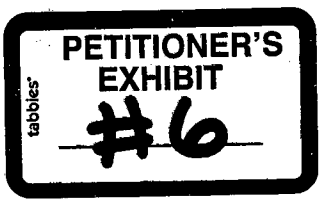
So we'll move on, I guess, now to the presentation of evidence but those are the State's arguments as it relates to what the Defendant has raised at this point in the Motion.

THE COURT: All right. Do you want to call your witness?

MR. BROWN: Yes, but there's a couple of things I want to address. I've received substantial discovery but I did not receive a recording of my client allegedly slitting my -- the victim's throat. So if the -- if I can be provided that recording, it's essential that I hear it.

THE COURT: Do you have that recording?

MS. MURPHY: Yes, Your Honor. And that's what I was just going over to make sure that it was included. I believe it was included on the original discovery that was provided back in March of this year. But certainly, if the Defense doesn't have it for whatever reason, we'll certainly give it to them.



Affidavit of Shardae Allen

State of California
County of Orange

BEFORE ME, the undersigned Notary Public, personally appeared Shardae Allen, who makes the following statement and affidavit upon oath and affirmation of belief and personal knowledge that the following matters, facts, and things set forth are true and correct to the best of his or her knowledge:

1. My name is Shardae Allen, and I currently reside at 2200 E Ball Rd, Anaheim, California 92806 in Orange County

2. I am either over the age of 18 or a legally emancipated minor

3. I suffer no legal disabilities and have personal knowledge of the facts set below. Therefore, I hereby state the following:

4. Before I agreed to return to the State of Georgia to testify on the State's behalf in the case against Willie Alfred Green in Cherokee County, Georgia, in May of 2017, I was told by the prosecutor assigned to the case, Ms. Ashton S. Murphy, that in exchange for my cooperation and testimony with her case that I would not be prosecuted for giving perjured testimony at the TPO hearing on May 31st 2016 and that I would also not be prosecuted for planting evidence against Mr. Green at our home on May 30th 2016.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that the statements provided herein have been freely and voluntarily given and have not been extracted by any sort of coercion, threats or violence, nor obtained by any direct or implied promises, however slight.

DATED: March 15, 2021

SHARDAE ALLEN

Notary Public

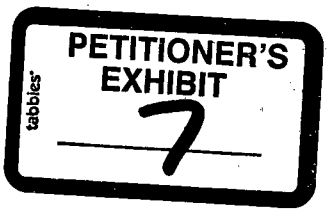
A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California
County of Orange

Subscribed and sworn to (or affirmed) before me on this 15th day of March, 20 21, by **Shardae M. Allen**, proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

(Seal) Signature _____

JANENE A. VALEN
COMM. #2188295
Notary Public - California
Orange County
My Comm. Expires Apr. 22, 2021



Yes, four more audios.

THE COURT: What's on that?

MR. BROWN: I haven't -- Your Honor, --

THE COURT: (Interposing) You haven't had time to look at it, have you?

MR. BROWN: According to the Rules, I'm supposed to have all discovery 10 days before trial.

MS. MURPHY: Your Honor, the disc that he's referring to, the one that Mr. Brown picked up yesterday, it was provided -- it was created on May 3rd, 2017. The State attempted to send it to him. We tried to give him at calendar call. I finally sent an email, since it hadn't been picked up at calendar call, on May 9th, saying: We've still got discovery available for you if you want to come pick it up and it wasn't picked up.

MR. BROWN: Not that disc, Your Honor, not that disc.

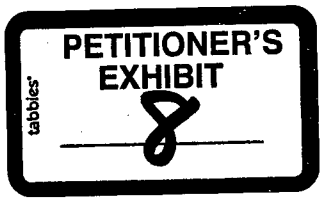
THE COURT: It's your obligation to serve discovery if you want to use it.

MS. MURPHY: Yes, Judge.

THE COURT: So what are you asking?

MR. BROWN: I'm moving for a continuance, Your Honor.

MS. MURPHY: Your Honor, the State is opposed. Like I -- I did say, I would prefer to be able to use it. There's nothing to my knowledge that would exclude it at this point. So we would ask to be able to use it.



In the alternative, I think that the witnesses can testify about it. So we would ask to continue to go forward.

MR. BROWN: Mr. Green absolutely would not get a fair trial if we go forward. I'm changing my announcement from ready to not ready, Your Honor.

THE COURT: It's -- if there's nothing exculpatory on the -- in the -- in the disc, the fact that it's not being used is not going to prejudice your client. In fact, it may benefit your client. But I'm not going to let it be used because it wasn't provided in discovery.

And these video and audio recording discovery issues keep popping up. There ought to be a better system in the D.A.'s Office to make sure that evidence you want to put in a case is in the hands of the Defendants in advance of trial so that this doesn't happen over and over and over.

So I'll exclude the evidence, but I'll deny your continuance.

MS. MURPHY: Thank you, Your Honor.

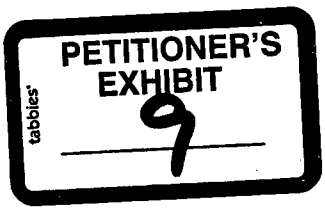
THE COURT: All right. Are we ready to pick a jury?

MS. MURPHY: The State's ready, Your Honor.

THE COURT: Are you ready?

MR. BROWN: Your Honor, I maintain that I'm not ready, Your Honor.

THE COURT: Well, I -- you were ready before you knew



about this. It's not any -- it's not prejudicing your case. So there's nothing that suggests that you're not ready.

MR. BROWN: Your Honor, I don't know what else has not been provided by the State as far as discovery. Your Honor, just getting discovery the eve before trial, Mr. Green is not going to get a fair trial.

THE COURT: Well, unless you have some evidence to point to that, then your Motion is denied. We're going to pick a jury today.

(Whereupon, a discussion is had between Defendant Green and Counsel off of the record.)

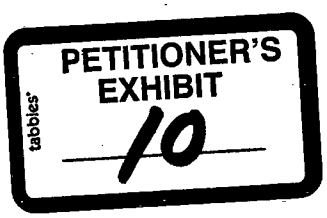
MR. BROWN: You can mention that because you're representing yourself.

THE COURT: No. You're representing him, he can talk to you.

MR. BROWN: Your Honor, I -- yesterday, you --

THE COURT: (Interposing) No, I'm not going to let him represent himself. I went over the evidence we talked about yesterday. I looked at the case law and under *the United States versus Bennett*, I determined that he's forfeited his right to self-representation by waiting until after the case was called for trial to make that request.

And I've also considered the fact that you're his



third attorney and that he's made those choices. You're going to represent him in this case and we're going to have a jury trial.

MR. BROWN: Your Honor, I'm not ready.

THE COURT: Well, I understand that. You've announced ready and -- and insisted on the case being tried for the last three calendars calls over the --

MR. BROWN: (Interposing) When I -- when I had --

THE COURT: -- over the last four months and the evidence that -- that you are complaining of is not going to be used in the case.

MR. BROWN: When I thought I had all the evidence. I don't know -- I need to actually look through the State's file to make sure that I don't have --

THE COURT: (Interposing) Well, you should have already done that. They have an open-file policy. There's no reason to believe there's any additional evidence and this case is -- there's no better time to try this case than today.

So we're going to call a jury up here and we're going to have a voir dire and we're going to start a jury trial today and I don't want to hear anymore.

We need 40 jurors in the -- in the gallery.

(Whereupon, a pause is had in the proceedings.)

THE COURT: And that cite on that case is F -- *the*